IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-822

In the Matter of the Application of
JOHN LANE, JR.,
Appellant,
for a Judgment Under Article 78 of
the Civil Practice Law and Rules, etc.

v.

NORMAN F. GALLMAN, President, et al.,
constituting the STATE TAX COMMISSION OF
THE STATE OF NEW YORK,
Respondents

On Appeal From the Court of Appeals
of the State of New York

JURISDICTIONAL STATEMENT

DECEMBER 1977

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JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the Court of Appeals of the State of New York, dated and entered April 28, 1977, dismissing appellant's appeal sua sponte. The finality of said order was deferred by an Order To Show

Cause Containing Temporary Stay, signed by Judge Jacob D. Fuchsberg of that court on Juiy 26, 1977, as more specifically shown below.

Appellant requests remand to the New York Court of Appeals for full consideration of the constitutional issues of this case (summarily dismissed by it) in light of United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1961), as applied by the U.S. Court of Appeals for the D.C. Circuit in District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967)--a case indistinguishable from the one at bar, and allowed to stand by this Court. If remand is inappropriate, then this Court should proceed to hear and decide the merits.

OPINIONS BELOW

The State Tax Commission's decision is not reported. It is set forth in Appendix A, infra.

Appellant's petition for redetermination was initially filed in the New York Supreme Court, Albany County, which transferred the matter, without opinion, to the Appellate Division of the Supreme Court for initial disposition pursuant to Section 7804(b) of the Civil Practice Law and Rules.

The memorandum decision of the Appellate Division is reported at 49 App. Div. 2d 963, 373 N.Y.S.2d 700. It is set forth in Appendix B, infra.

Appellant's motion to the Appellate Division for leave to appeal to the New York Court of Appeals, dated December 1, 1975, was denied without opinion on

March 25, 1976, 38 N.Y.2d 711, 348 N.E.2d 619, 384 N.Y.S.2d 1025.

On appeal as of right, the New York Court of Appeals rendered no opinion. Its unreported order of April 28, 1977, dismissing the appeal sua sponte, without opinion, with the statement that "no constitutional question is directly involved," is set forth in Appendix C, infra. (The fact of dismissal is listed in 42 N.Y.2d 823, 364 N.E.2d 1353, 396 N.Y.S.2d ___ (Adv. Sheet No. 4, Aug. 23, 1977, at CVIII).) Its subsequent Order To Show Cause Containing Temporary Stay (unreported), signed July 26, 1977, and entered July 28, 1977, is set forth in Appendix D, infra. The motion made by order to show cause, for vacation or stay of the dismissal and for oral argument, was subsequently denied by order entered September 9, 1977, without opinion,

unreported, set forth in Appendix E, infra.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a proceeding brought by appellant under Article 78 of the New York Civil Practice Law and Rules to review a decision of the State Tax Commission that as a matter of law (there being no dispute as to the facts) appellant was taxable on income earned out-of-state during the last ten months of 1965, after he had admittedly abandoned his only New York abode (his parents' home) and was no longer in fact a resident of the state, and was thus no longer subject to the tax imposed by law on every resident of the state (including out-of-state income) but only subject to the tax im-

posed on nonresidents of the state (limited to New York income).

(ii) The judgment or decree sought to be reviewed is the order of the New York Court of Appeals, dated and entered April 28, 1977, dismissing the appeal sua sponte (Appendix C, infra).

Since there was no hearing, no petition for rehearing was filed. Rather, by timely Order To Show Cause Containing Temporary Stay (Appendix D, infra), signed July 26, 1977 (within the time otherwise allowed for a petition for rehearing), and entered July 28, 1977, appellant moved the same court for an order vacating or staying the sua sponte dismissal and adhering to its prior determination that "this appeal will continue in its normal course and the Court will not act sua sponte."

(A copy of the Order To Show Cause,

with the Petition therefor showing (i) the Court of Appeals' retraction of its prior determination not to dismiss sua sponte, and (ii) three serious misstatements of fact by respondents in their brief to the Court of Appeals on the merits, was forwarded to this Court under letter of July 27, 1977, for information re the extension of time to docket theretofore granted (No. A-53).)

The Order To Show Cause stayed the operation and effect of the dismissal order "until ten days after the service upon counsel for Appellant of an order determining this application." (The temporary stay was expressly sought in order to preserve appellant's right of appeal to this Court pending decision on the motion.)

The motion to allow the appeal to continue to oral argument was denied by

order dated and enteredSeptember 9, 1977. As of December 5, 1977, a copy of said order had not been served upon appellant by either the Court of Appeals or respondents. The order was dictated to appellant by the court clerk's office on December 6, 1977, and appellant understands he was finally served by respondents by mailing on that date.

Notices of appeal were filed on December 6, 1977, in the New York Court of Appeals and in the Appellate Division, Third Department, of the New York Supreme Court, since appellant is uncertain which of those courts is possessed of the record. They are set forth in Appendix F, infra.

(iii) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257(2), this being an appeal which draws into question the validity of New York

Tax Law Secs. 605(a)(1) and 654 on the grounds that, (1) as construed by the New York courts, they are repugnant to the Constitution of the United States, and (2) the decisions of the New York courts upholding the statute constitute ad hoc adjudication in violation of the Constitution of the United States.

(iv) Cases sustaining the jurisdiction of this Court are:

Lawrence v. State Tax Commission, 286 U.S. 276, 282-83 (1932)

Chicago G.W.R. Co. v. Basham, 249 U.S. 164 (1919)

United States v. Healy, 376 U.S. 75, 76-80 (1964)

Tumey v. Ohio, 273 U.S. 510, 515 (1927)

Matthews v. Huwe, 269 U.S. 262 (1925)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Fourteenth Amendment to United States Constitution

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. New York Tax Law Sec. 605

Section 605 of the New York Tax Law provided in pertinent part (at all times here pertinent):

> Sec. 605. Resident and non-resident defined
>
> (a) Resident individual. A resident individual means an individual:
>
> (1) who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains

> a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state, or
>
> (2) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in the armed forces of the United States during an induction period.
>
> (b) Nonresident individual. A nonresident individual means an individual who is not a resident.
>
> * * *
>
> [Omitted subdivisions relate only to estates or trusts]
>
> (e) Cross reference. For effect of change of an individual's resident status, see section six hundred fifty-four.

N.Y. Tax Law Sec. 605, McKinney's Bk. 59, 2nd Vol., at 272-73 (1975).

III. New York Tax Law Sec. 654

Section 654 of the New York Tax Law

provided in pertinent part (at all times here pertinent):

> Section 654.
>
> (a) General. If an individual changes his status during his taxable year from resident to nonresident, or from nonresident to resident, he shall file one return as a resident for the portion of the year during which he is a resident, and one return as a nonresident for the portion of the year during which he is a nonresident, subject to such exceptions as the tax commission may prescribe by regulation.

N.Y. Tax Law Sec. 654(a), McKinney's Bk. 59, 2nd Vol., at 339 (1975).

QUESTIONS PRESENTED

1. Whether New York State has jurisdiction, constitutionally, to tax appellant's income earned out-of-state during the last ten months of 1965, after he had admittedly permanently abandoned his only New York abode (his parents'

home) and was no longer in fact a resident of the state, did not own property in the state, no longer enjoyed benefits in the state, and was a de facto resident of another state.

2. Whether a state may constitutionally make ad hoc, discriminatory application of its income tax laws in order to maximize the tax, by reaching precisely opposite conclusions as to the legal effect of the identical statutory provisions in two cases upon facts identical (so far as relevant), and even citing the first to support the second, opposite result.

3. Whether this case should be remanded to the New York Court of Appeals for full consideration of the constitutional issues of this case (summarily dismissed by it) in light of United States v. Jin Fuey Moy, 241 U.S. 394, 401

(1961), as applied by the U.S. Court of Appeals for the D.C. Circuit in District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967) --a case indistinguishable from the one at bar and allowed to stand by this Court.

STATEMENT OF THE CASE

I. Facts

Appellant agrees with the following findings of fact in the respondents' decision:

> 2. Until March 1, 1965, petitioner resided with his parents in Yonkers, New York. He finished law school in June, 1964, and worked for a New York City law firm until February, 1965. He applied for a direct commission into the Air Force Reserve and received a commission in January, 1965.
>
> 3. On March 1, 1965, petitioner reported to his duty station at the office of the General Counsel, United States Air Force, Pentagon Building, Washington, D.C. From

> March until November, 1965, he rented an apartment in Arlington, Virginia under a six month lease. He then moved to another rented apartment in Alexandria, Virginia which he held under a yearly lease and which he kept until 1967. Both apartments were chosen so as to be suitable after petitioner's planned marriage in September, 1965.
>
> 4. Petitioner spent more than 30 days in New York State between January 1, 1965, and February 28, 1965. He spent no time in New York State between March 1, 1965, and December 31, 1965.
>
> 5. The deficiency amounts to $50.75 including interest. The refund claimed is for withholding tax in the amount of $35.20.

It is not questioned, and the record establishes, that appellant has never resided in New York after March 1, 1965, and has never at any time ever had an interest, whether ownership or rental or otherwise, in any place of abode in the State of New York.

Accordingly, since true domicile for tax purposes necessarily imports

residence, appellant as a matter of law could not be domiciled in New York within the meaning of the Tax Law after March 1, 1965. Therefore, respondents' only other purported finding of fact--that "1. Petitioner was during 1965 and prior years, a domiciliary of New York State"--was a conclusion of law, constitutionally erroneous under the Due Process Clause (as shown infra), and (as also shown infra) directly inconsistent with its own and the Appellate Division's conclusion in Kritzik v. Gallman, where it was held: "When petitioners moved to Connecticut in July, they no longer maintained a permanent place of abode in New York. They could not, therefore, meet the statutory requirements for residents." 41 App. Div. 2d 994, 344 N.Y.S.2d 107 (1973).

It is also unquestioned that after March 1, 1965, appellant did not actually

enjoy any benefits in New York and was not legally entitled to benefits concomitant with living or working there.

II. When and How the Federal Questions Were Raised and Decided Below

In its brief in the Appellate Division (p. 9) the Tax Commission opened its defense of the tax under attack by going on the offense, and the spearhead of the offense was the proposition that the constitutionality of the tax in issue had been upheld by the United States Supreme Court, viz.:

ARGUMENT

> THE PETITIONER WAS SUBJECT TO NEW YORK STATE INCOME TAX AS A RESIDENT OF NEW YORK STATE FOR THE ENTIRE YEAR 1965 UNDER THE PROVISIONS OF TAX LAW, SEC. 605.
>
> The United States Supreme Court has upheld the right of a state to tax a person domiciled therein on income derived from outside sources (Lawrence v. State Tax

Commission, 286 U.S. 276 (1932); People ex rel. Cohn v. Graves, 300 U.S 308 (1937)).

> The petitioner readily admits that he was domiciled in New York State during the entire year of 1965 and that he spent more than 30 days in New York State from January 1, 1965 to March 1, 1965. It is submitted that these facts alone subject him to New York State income tax as a resident for the entire year under the provisions of Tax Law, Sec. 605(a)(1).

In the first sentence of text above, respondent effectively introduced into this case in the Appellate Division the question of the constitutionality of the tax in issue, specifically, the question of the state's jurisdiction to tax under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The undersigned attorney for the appellant herein upon argument informed the Appellate Division in substance of the constitutional question involved in

taxing a nonresident (before entering or after leaving a state) upon income earned outside the taxing state; referred the court to the latest authoritative case, District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967), wherein the tax had been on income earned by a nonresident before taking up residence in the District; that the tax had been held unconstitutional, and the unconstitutionality reversed, but the tax nullified by construing the statute as not intended to tax the income in question, per United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1961).

In addition, counsel mentioned an issue of the Iowa Law Review (Vol. XXII, No. 2, 1937) containing a symposium of eight articles on state income taxation, a copy of which had been procured for the convenience of the court.

Appellant's argument time (15 minutes) was inadequate to the task, and counsel addressed a letter after argument to Honorable Michael E. Sweeney, the Justice who presided on the day of argument, to identify properly a number of items which had been referred to, particularly the citation to District of Columbia v. Davis, supra, in the fifth paragraph of the letter as the case cited to the court on argument. A copy of said letter was sent at the same time to respondents, who did not object in any respect to its accuracy or consideration by the court. The letter is attached as Appendix G, infra. (Appellant understands that the oral argument to the court was not recorded.)

It should be noted that the hearing, i.e., argument, before the Appellate Division was the first before any court.

The matter had been transferred to the Appellate Division from the Supreme Court, Albany County.)

Unconstitutionality under the Due Process Clause was also urged in the motion to the Appellate Division for reargument or leave to appeal, and in the motion to the Court of Appeals for leave to appeal, both without objection from opposing counsel. It was further urged in appellant's brief in its appeal as of right thereafter taken to the Court of Appeals, whereupon respondents for the first time alleged that the issue had not been raised below. A copy of the letter to Justice Sweeney, referred to above, appeared at page 72 of the Record on Appeal to the Court of Appeals.

Regarding the equal protection violation, appellant asserted unconstitutional ad hoc application of the tax law

by the Appellate Division as violating the Equal Protection Clause in its brief in its appeal as of right to the Court of Appeals. It is evident that this question could not have been urged in the Appellate Division before its decision was issued which constituted the equal protection violation.

The Appellate Division's memorandum decision and denial of reargument and leave to appeal made no reference whatever to the constitutional question raised by appellant.

The Court of Appeals' order dismissing sua sponte the appeal taken as of rightstated that "no constitutional question is directly involved," thereby ruling against appellant on the merits of the constitutional questions but without discussion--and also without hearing oral argument, even though, in reliance upon

that court's prior jurisdictional determination that the matter would proceed to argument, appellant had proceeded with full briefing of the constitutional questions.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Due Process Question

The first issue in this case is whether appellant's out-of-state income earned during that portion of the taxable year after appellant had permanently terminated residence in the state is, and may constitutionally be, taxable under the New York Tax Law. Respondents and the New York courts have construed the Tax Law as imposing a tax on such income.

The foregoing construction presents a grave constitutional question.

It is fundamental that the Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits a state from taxing beyond its territorial jurisdiction. Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954).

The constitutional basis for state taxing jurisdiction is actual enjoyment of benefits in the state, or legal entitlement to benefits while living or working there. Shaffer v. Carter, 252 U.S. 37, 50-53, 57 (1920); Lawrence v. State Tax Commission, 286 U.S. 276, 279-80 (1932); People ex rel. Cohn v. Graves, 300 U.S. 308, 313 (1937); Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940); Miller Bros. Co. v. Maryland, supra, 347 U.S. at 344-45; cf. American Commuters Association v. Levitt, 405 F.2d 1148, 1152-53 (2d Cir. 1969). Also necessary is power to enforce the tax. Shaffer

v. Carter, supra, 252 U.S. at 49.

Thus a resident of a state, because personally actually within the jurisdiction of the state and enjoying benefits there, is taxable on all income, in-state and out-of-state. Lawrence v. State Tax Commission, supra; People ex rel. Cohn v. Graves, supra. And a nonresident--because the state has only in rem jurisdiction and not personal jurisdiction over him--is subject to tax only to the extent he owns property in the state or carries on a business, trade, or profession in the state. Shaffer v. Carter, supra, 252 U.S. at 53, 57.

Under facts virtually identical in all material respects to the present case, one court has squarely held a tax such as that here in issue to be unconstitutional, Davis v. District of Columbia, Docket No. 1969, D.C. Tax Court, Opinion Filed

December 22, 1965, at 12 (Appendix H, infra), modified on appeal, 371 F.2d 964 (D.C. Cir., cert. denied, 386 U.S. 1034 (1967); the highest court of one state has held in an advisory opinion that such a tax would be invalid, In re Opinion of the Justices, 88 N.H. 500, 190 Atl.801, 806 (1937); the U.S. Court of Appeals for the D.C. Circuit and the highest courts of four states have held that such a tax presents grave constitutional questions and have construed the tax statutes in issue so as to avoid deciding those questions. District of Columbia v. Davis, 371 F.2d 964 (D.C. Cir.), cert, denied, 386 U.S. 1034 (1967); Kennedy v. Commissioner, 256 Mass. 426, 152 N.E. 747 (1926); Greene v. Wisconsin Tax Commission, 221 Wis. 531, 266 N.W. 270 (1936); Martin v. Gage, 281 Ky. 95, 134 S.W.2d 966 (1939); Forester v. Culpepper, 194 Ga.

744, 22 S.E.2d 595 (1942). Indeed, the D. C. Circuit in Davis, supra, regarded the New York statute here in issue as a clear example of one which did not purport to tax out-of-state income in the nonresident portion of the taxable year, before the taxpayer moved into or after he left the state. 371 F.2d at 967-68 & n. 2.

We have come across no case in any jurisdiction wherein an effort was made to impose an income tax upon income of the character and under the circumstances of the case at bar. The only reported case apparently not in accord is Wood v. Tawes, 181 Md. 155, 28 A.2d 850 (1942), cert. denied, 318 U.S. 788 (1943). The value of Wood is depreciated by the Maryland Legislature's later amendment of its tax statute expressly to avoid taxing out-of-state income earned during the

nonresident period in the year of a residence change into or out of the state. Maryland Code Art. 81, Sec. 279(i), as amended by 1959 Laws, Ch. 482. Moreover, the D.C. Tax Court and the D.C. Circuit did not follow the Wood case in Davis even though it was relied upon by the D.C. Government.

The case at bar is one of first impression for this Court.

II. The Equal Protection Question

Appellant's primary argument to the New York courts was for construction of the Tax Law to avoid the serious due process question in I above. Oddly enough, the most direct support for appellant's construction of the Tax Law was the very decision of the Appellate Division which that court cited to support its finding for respondents in this case.

In Kritzik v. Gallman, 41 App. Div. 2d 994, 344 N.Y.S.2d 107 (1973), a taxpayer who would have benefited from being considered a resident for the entire taxable year was denied resident status and taxed as a nonresident for the period after he terminated residence in the state. There was no basis whatever in the stipulated facts or elsewhere in the record of that case for a finding of a change of domicile, and the Appellate Division made no mention of a change of domicile. The decision turned entirely on the absence of a place of residence in the state.

The Tax Commission's brief in that case urged, and the Appellate Division adopted, precisely the construction of the Tax Law that this appellant urged upon that court in this case. The Commission argued in that case:

> However, it is obvious that the provisions of section 605 do not relate to individuals who have changed residence status during the year as section 654 makes particular provision for change of residence status.
>
> Since petitioners did change residence status during 1967, section 605 does not apply, and it is clear that petitioners were nonresidents for the part of the year 1967 from July 27 to December 31.

The Appellate Division held:

> Initially, we find no merit to the contention that petitioners were residents for the entire year of 1967 based on paragraph (2) of subdivision (a) of section 605 of the Tax Law. Section 654 of such law is clearly applicable where, as here, there is a change of status during the tax year from resident to nonresident. When petitioners moved to Connecticut in July, they no longer maintained a permanent place of abode in New York. They could not, therefore, meet the statutory requirements for residents. (Tax Law, Sec. 605, subd. (a)(2). Emphasis added.

Appellant sought precisely that

result in this case--to be treated as a nonresident after March 1, 1965, because of the absence of actual residence and of a permanent place of residence in the state. Yet the respondents and the Appellate Division refused appellant here the benefit of that holding. This inconsistent, ad hoc application of the split-year provision of the Tax Law, sustained by the New York Court of Appeals, appears to deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. That Amendment requires that all persons in the same class be accorded equality of treatment in the imposition of state taxes, and that any differences in treatment of different persons "rest on real and not feigned differences." Walters v. City of St. Louis, 374 U.S. 231, 237 (1954)(and authorities cited).

CONCLUSION

Appellant urges that the New York Tax Law is unconstitutional insofar as it has been construed by the New York courts to tax appellant's income earned outside the state during the ten months in 1965 after he became a nonresident.

Nevertheless, appellant would still prefer, as from the beginning, to have the Tax Law construed as not purporting tc tax appellant's income after he became a nonresident. There is extensive legislative history, fully presented by appellant to the New York courts but completely ignored by them and by respondents, demonstrating that the Legislature did not intend the result reached by the courts, but rather intended to tax persons as residents (i.e., on out-of-state income) only for the period they

actually are residents.

Understanding that this Court does not ordinarily review a state's construction of its own statute, appellant nevertheless does not seek a conclusive constitutional determination by this Court at this time, unless it is deemed unavoidable. The most satisfactory resolution for all concerned at this time would be for this Court to reverse on the ground that there are serious constitutional questions not adequately considered by the New York courts, and remand to the New York Court of Appeals for full consideration thereof in the light of United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1961), which requires construction to avoid grave constitutional questions. The latest and most authoritative application of that doctrine in a pertinent case is District of Columbia v. Davis,

371 F.2d 964 (D.C. Cir.), cert. denied, 386 U.S. 1034 (1967), which is virtually on all fours and should be considered controlling here.

Appellant is convinced that upon full and fair consideration, the New York Court of Appeals could not avoid upholding appellant's construction of the Tax Law.

RESPECTFULLY SUBMITTED,

JOHN LANE
JOHN LANE, JR.

Attorneys for Appellant

December 1977

APPENDIX

Decision of State Tax Commission.

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

JOHN LANE, JR.

for a Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Year 1965.

John Lane, Jr. filed a petition under section 689 of the Tax Law for the redetermination of a deficiency and for refunds in personal income tax under Article 22 of the Tax Law for the year 1965. In lieu of a hearing, the petitioner, without counsel, and the Income Tax Bureau, by Edward H. Best, Esq. (Francis X. Boylan, Esq., of Counsel), have submitted the file pertaining to the deficiency to the State Tax Commission. Said file has been duly examined and considered.

ISSUE

The issue in this case is whether a domiciliary of this State who changed his abode during 1965 is a resident for the entire year or whether he can be considered a nonresident for part of the year under section 605 of the Tax Law, and thus entitled to file a nonresident return for part of the year under section 654 of the Tax Law.

FINDINGS OF FACT

1. Petitioner was, during 1965 and prior years, a domiciliary of New York State.

2. Until March 1, 1965, petitioner resided with his parents in Yonkers, New York. He finished law school in June, 1964, and worked for a New York City law firm until February, 1965. He applied for a direct commission into the Air Force Reserve and received a commission in January, 1965.

3. On March 1, 1965, petitioner reported to his duty station at the office of the General Counsel, United States Air Force, Pentagon Building, Washington, D.C. From March until November, 1965 he rented an apartment in Arlington, Virginia under a six month lease. He then moved to another rented apartment in Alexandria, Virginia which he held under a yearly lease and which he kept until 1967. Both apartments were chosen so as to be suitable after petitioner's planned marriage in September, 1965.

4. Petitioner spent more than 30 days in New York State between January 1, 1965, and February 28, 1965. He spent no time in New York State between March 1, 1965, and December 31, 1965.

5. The deficiency amounts to $50.75 including interest. The refund claimed is for withholding tax in the amount of $35.20.

CONCLUSIONS OF LAW

Petitioner was a New York resident, as defined in section 605 of the Tax Law, for the entire year 1965 and was not entitled to file a return for part of 1965 under section 654 of the Tax Law as a nonresident. Petitioner did not change his domicile during 1965. Furthermore, he remained a New York resident since he had no place of abode outside of New York for the entire year 1965, and he did maintain a place of abode in New York for

part of such year. We must reject petitioner's argument that he satisfied the conditions of section 605(a)(1) when only the latter part of 1965 is considered and that therefore he should be considered a nonresident for that part of the year. The acquisition of a new place of abode or the abandonment of an old place of abode during a taxable year does not cause a change in residence during such taxable year.

The provisions defining residence in terms of permanent place of abode were added to the income tax law (see section 350 subdivision 7 of Article 16 of the Tax Law, the predecessor of section 605) by Chapter 425 of the Laws of 1922 to affect only those individuals who continuously from year to year claim a domicile in one state but actually maintain a home in another state with some degree of permanence. These provisions have been interpreted to mean that the requisite permanent place of abode must exist for the entire taxable year.

The further provisions added by chapter 462 of the Laws of 1934 relating to New York domiciliaries and imposing the duel requirement that a domiciliary maintain no permanent place of abode in New York and maintain a permanent place of abode outside of New York have been interpreted to impose two separate requirements relating to a permanent place of abode each of which must be met for the entire taxable year in question and neither of which has been met by this petitioner. The provisions of section 654 of the Tax Law relating to two returns thus apply only where there is a change in residence by reason of a change of domicile during the taxable year. These provisions have never been held to apply where there is only an acquisition or abandonment of a place of abode even though they were added to the predecessor of section 654 (section 367-a of Article 16 of the Tax Law) by the same law (chapter 425 of the Laws of 1922), that defined residence in terms of a permanent place of abode. This construction of the law has been upheld by the courts in People ex rel. *Mackell* v. *Bates*, 278 App. Div. 724.

DECISION

The petition is denied. The refunds are denied. The deficiencies are affirmed together with such interest, if any, as may be due under section 684 of the Tax Law.

Dated: Albany, New York, March 16, 1972.

STATE TAX COMMISSION

/s/ NORMAN F. GALLMAN
Commissioner

/s/ A. BRUCE MANLEY
Commissioner

/s/ MILTON KOERNER
Commissioner

APPENDIX B

MEMORANDUM DECISION OF THE APPELLATE DIVISION, THIRD DEPARTMENT, OF THE NEW YORK SUPREME COURT (No. 25356, dated October 23, 1975)

(Captions omitted)

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court at Special Term, entered in Albany County) to review a determination of the State Tax Commission which denied petitioner's application for a redetermination of a deficiency and for a refund in personal income tax for the year 1965.

Individuals subject to the New York personal income tax are classified as either residents or nonresidents as those terms are defined by Section 605 of the Tax Law. Section 654 of the Tax Law governs those situations in which an individual's status as a resident or a nonresident changes during his taxable

year. Claiming that his former resident status had changed during 1965, petitioner invoked section 654 and computed his tax liability for that year under its provisions. The Tax Commission disagreed, determining that a higher tax amount was due from him as a resident, and this proceeding ensued when petitioner's application for a redetermination of a deficiency and claim for a refund was denied.

The facts are undisputed. Petitioner remained a New York domiciliary throughout the tax year in question although he left his former permanent abode in Yonkers on March 1, 1965 when he entered military service. For the balance of that year he maintained a permanent abode at different locations in the State of Virginia and did not return to New York. Sometime after 1965 he

abandoned his domicile in this jurisdiction.

Insofar as it relates to this case, a resident individual is defined as one "* * * who is domiciled in this state, unless he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state" (Tax Law, Sec. 605, subd. [a], par. [1]). Petitioner insists that since he met the conditions of exception after March 1, 1965, his status had changed to that of a nonresident during the tax year. The Tax Commission, on the other hand, interprets the conditions of exception as applying to an entire taxable year and concludes that, when so measured, petitioner failed to remove himself from the resident classification during 1965

because he maintained a permanent abode and spent more than 30 days in this State. Under this construction, as petitioner correctly observes, it would be impossible for him to effect a change in his resident status during any taxable year without making a corresponding change in his domicile. However, merely because section 654 of the Tax Law contains a procedure to be followed when a change in status occurs during a tax year, it does not necessarily follow that such a change is thereby authorized or made possible in every circumstance. We cannot say that the Tax Commission's interpretation of these provisions is irrational or unreasonable since it is entirely consistent with prior case law on related topics (Matter of Kritzik v. Gallman, 41 A D 2d 994; People ex rel. Mackall v. Bates, 278 App. Div. 724;

Matter of Rothfeld v. Graves, 264 App. Div. 54, affd. 289 N.Y. 583). Accordingly, its construction must be upheld (cf Matter of Howard v. Wyman, 28 N Y 2d 434, 438).

Determination confirmed, and petition dismissed, without costs.

SWEENEY, J. P., KANE, KOREMAN, MAIN and LARKIN, JJ., concur.

ORDER OF NEW YORK COURT OF APPEALS DISMISSING APPEAL SUA SPONTE (3 Mo. No. 424 SSD 39, dated April 28, 1977)

(Captions omitted)

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

S/ Joseph W. Bellacosa

Joseph W. Bellacosa

Clerk of the Court

NEW YORK COURT OF APPEALS--ORDER TO SHOW CAUSE CONTAINING TEMPORARY STAY (Clerk's File No. 601; Index No. 7478-73; dated July 26, 1977, entered July 28, 1977)

(Captions omitted)

Upon the annexed Petition of Appellant herein by his attorney, John Lane, Esq., verified the 24th day of July, 1977, and upon all papers filed and proceedings heretofore had herein and due deliberation having been had, it is

ORDERED, that the Respondents herein, constituting the State Tax Commission of the State of New York, show cause before this Court at a session thereof to be held at Court of Appeals Hall in the City of Albany, on the 29th day of August, 1977, at 10 o'clock, a.m. on that day, why this Court should not vacate, or stay the operation and effect of, its Order entered herein April 28,

1977, dismissing sua sponte the appeal then pending herein fully briefed and adhere to its prior determination of July 16, 1976 herein, that "* * * this appeal will continue in its normal course and the Court will not act sua sponte * * *," but without prejudice to the consideration of any question of subject matter jurisdiction which it may deem warranted at the time of oral argument; and sufficient reason appearing therefor, it is

FURTHER ORDERED, without objection by the Respondents, that the operation and effect of the Order of this Court dated and entered herein April 28, 1977, by and is hereby stayed in all respects until ten days after the service upon counsel for Appellant of an order determining this application; and it is

FURTHER ORDERED, that service of

this order to show cause shall be sufficient if made by mail upon Louis J. Lefkowitz, Attorney General of the State of New York, attention Francis V. Dow, Esq., Assistant Attorney General, Department of Law, Capitol Building, Albany, New York 12224, on or before 6 p.m. o'clock on the 28th day of July, 1977.

Dated: New York, N.Y.
July 26, 1977

S/ Jacob D. Fuchsberg
Judge

(Stamp:)

That service of a copy of this order be made as aforementioned on or before 6 p.m. July 28, 1977, and the original order be filed, with proof of service, immediately after service, in the Office of the Clerk of the Court at Albany by certified mail, return receipt requested.

S/ J.D.F.

ORDER OF NEW YORK COURT OF APPEALS DENYING MOTION FOR VACATION OF SUA SPONTE DISMISSAL (3 Mo. No. 880, dated September 9, 1977)

(Captions omitted)

A motion having heretofore been made upon the part of appellant to vacate this Court's order of dismissal dated April 28, 1977 &c., and papers having been submitted thereon, and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/ Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court

NOTICES OF APPEAL

(Identical Notices of Appeal filed on December 6, 1977, in the New York Court of Appeals (Clerk's File No 601, Index No. 7478-73) and in the Appellate Division, Third Judicial Department, of the New York Supreme Court (Index No. 7478-73))

(Captions omitted)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that John Lane, Jr., the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, dated and entered in this proceeding on April 28, 1977, dismissing the appeal then pending before it from the final order of the Appellate Division of the Supreme Court, Third Judicial Department, dated and entered in the office of the Clerk of said Court on the 27th day of October, 1975, confirming

a determination of the Respondent State Tax Commission of the State of New York, and dismissing the petition in this proceeding.

This appeal is taken pursuant to 28 U.S.C. Sec. 1257(2).

Dated: New York, N.Y.
December 5, 1977

Yours, etc.

JOHN LANE, ESQ.
Attorney for
Petitioner-Appellant
Office & P.O. Abdress
14 Wall Street
New York, N.Y. 10005
(212-233-7780)

(Addressees shown as Attorneys for Respondents and the Clerks of the respective courts)

LETTER FROM APPELLANT TO PRESIDING JUSTICE OF APPELLATE DIVISION, 3RD DEPARTMENT, DATED OCTOBER 1, 1975

Re: Lane v. Gallman, Index No. 7478-3 Argued September 17, 1975, No. 25356

Honorable Sir:

Respondents (brief, p. 10) referred the Court to "The New York State Personal Income Tax," by John Chalmers, Ph.D., (1948), pp. 30-42.

Nothing therein conflicts with our view of the law as set forth in Petitioner's main and reply memoranda. In fact, the meaning of such words as "non-resident" and "domicile" as understood in the years when they were being incorporated into the statute (see pp. 34 and 35) are completely in accord with Petitioner's position.

One of the sources cited by Chalmers is a symposium of eight articles with an introduction by Roswell Magill on State

Income Taxation published in the Iowa Law Review (Vol. XXII, No. 2, 1937, copy of which has been made available for the convenience of the Court). Helpful here are:

1. "State Jurisdiction to Tax Income," by Henry Rottschaefer, Professor of Law, University of Minnesota (p. 292, espec. pp. 310-311, and cases cited: Kennedy v. Com'r. 256 Mass. 426, 152 N.E. 747, 1926, Greene v. Wisconsin Tax Comm., 266 N.W. 270, Wis., 1936)

/ The most recent decision on the same problem as, and in accord with, the Kennedy case, supra, was the case cited to the Court on argument: District of Columbia v. Davis, C.C.A.-D.C. (1967), 371 Fed. 2d 964, cert. denied, 386 U.S. 1034, 87 Sup. Ct. 1487, 18 L. ed. 2d 598 /

2. "Administration of the Personal Income Tax Law in New York State," by Roy

H. Palmer, First Assistant Director, New York State Income Tax Bureau (p. 313), espec. "Residence" pp. 322-326.

None of the foregoing mentions the addition of Sec. 367-a (predecessor to Sec. 654) to the Tax Law by Chapter 425 of the Laws of 1922 (copy enclosed). It obviously relates to the subject matter referred to by Rottschaefer (see Item 1, supra).

Respectfully yours,

S/ John Lane

(Copy shown to Attorneys for Respondents)

APPENDIX H

FINDINGS OF FACT AND OPINION OF THE DISTRICT OF COLUMBIA TAX COURT (FILED DECEMBER 22, 1965, DOCKET NO. 1969)

[Captions omitted]

FINDINGS OF FACT AND OPINION

The assessing authority of the District of Columbia assessed the petitioner a deficiency in income tax from which he here appeals on the grounds (a) that it is statutorily invalid, and (b) that it is unconstitutional. The respondent claims that the assessment was proper.

Findings of Fact

1. The petitioner is a domiciliary of the District of Columbia, residing at 4000 Tunlaw Road, Northwest.

2. (a) Up to and including March 31, 1963, the petitioner was a domiciliary of Michigan, residing in the City of Detroit, and as such he paid an intangible personal property tax to Michigan in the amount of $26.71, and an income tax to the City of Detroit in the amount of $45.41, or a total of $72.12.

(b) During the above three month period the petitioner's income was $5,142.42.

3. On April 1, 1963, the petitioner came to the District of Columbia and established his residence here, and has since that date been domiciled in the District.

4. The petitioner filed with the assessing authority of the District an income tax return for the period from April 1 to December 31, 1963, in which he reported adjusted gross

not decline to pass on the constitutional question, 16 C. J. S. 319, 320 and 321, *Constitutional Law,* par. 94.

If, as the petitioner claims, the assessment of an income tax on his income earned before he came to the District is invalid, it must be under the due process clause of the Fifth Amendment. *Wright* v. *Davidson,* 181 U. S. 371, 384, 45 L. Ed. 900, 21 S. Ct. 616, 621; *Moses* v. *United States,* 16 App. D. C. 428, 434, 50 L. R. A. 532; *Neild* v. *District of Columbia,* 71 App. D. C. 306, 316, 317, 110 F.2d 246. While the Fourteenth Amendment is not applicable to the District of Columbia,[7] the Fifth Amendment does so apply.

There can be no question that a state and the District of Columbia can constitutionally impose an income tax on a resident based upon or measured by his entire income, even if part thereof is received or earned without the state or the District. That is so because the state or the District has jurisdiction of the *person* of the taxpayer. It is recognized that a state or the District of Columbia has the constitutional power to impose an income tax when it has jurisdiction of either the person or the income of the taxpayer. But the situation is quite different in respect of income earned when the taxing state or the District has no jurisdiction of either the person or the income. That is the situation here in respect of the income earned by the petitioner before he came to the District. The assessing authority assessed an income tax upon the income earned by the petitioner without the District and while he was neither a resident nor a domiciliary thereof. The Court believes that under the due process clause of the Fifth Amendment such action was without the power of Congress as the legislature for the District to impose the tax; and that since such action was called for in Section 1 of Title VI and Section 1

[7] The ruling in *Bolling* v. *Sharpe,* 347 U.S. 497, 98 L. Ed. 884, 74 S. Ct. 693, cited by petitioner, may appear to be contrary, but the ruling was to avoid a constitutional hurdle in a school discrimination case, and apparently was quite limited to such cases. It was held the discrimination was violative of "due process".

of Title X of the District of Columbia Income and Franchise Tax Act of 1947 (Section 47-1567 and 47-1580 of the Code) are violative of the Fifth Amendment in so far as the situation or status of the taxpayer and assessment of the income tax on his income earned from January 1 to March 31, 1963, are concerned.

Since the due process clause of the Fifth Amendment does apply to the District of Columbia, the decisions of the Federal and State Courts involving the due process clause of the Fourteenth Amendment are helpful in the solution of the constitutional question here presented. In *Shaffer* v. *Carter,* 252 U. S. 37, 64 L. Ed. 445, 48 S. Ct. 221, Mr. Justice Pitney made the observation following:

> "And, as far as the question of jurisdiction is concerned, the due process clause of the Fourteenth Amendment imposes no greater restriction in this regard upon the several States than the corresponding clause of the Fifth Amendment imposes upon the United States."

In *New York, Lake Erie & Western R. R. Co.* v. *Pennsylvania,* 153 U.S. 628, 38 L. Ed. 846, 14 S. Ct. 952, it was held "that the power of the state, even in its power of taxation, in respect to property, is limited to such as is within its jurisdiction." *CF. Wallace* v. *Hines,* 253 U. S. 66, 64 L. Ed. 782, 40 S. Ct. 435, and *The City of St. Louis* v. *The Wiggins Perry Co.,* 11 *Wallace* 423, 20 L. Ed. 192. Also *Green* v. *Wisconsin Tax Commission,* 221 Wisc. 531, 266 N. W. 274; *Martin* v. *Gage,* 281 Ky. 95, 134 S. W. 966. In the famous case of *State Tax on Foreign-Held Bonds,* 15 Wall. 300, there is found on page 319 this language:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

In respect of, or in connection with the income of the petitioner earned by him without the District of Columbia from January 1 to March 31, 1963, the District did not have jurisdiction of either the person or the income of the petitioner.

There is nothing in *Neild* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246, or in *Mercury Press* v. *District of Columbia,* 84 U. S. App. D. C. 203, 173 F. 2d 636 (cert. den. 337 U. S. 931) that would deny the conclusion drawn herein by the Court. In the first case the taxpayers unsuccessfully invoked the commerce clause, and equal protection clause of the Fourteenth Amendment in a case involving commerce between the District and areas outside and retroactivity. The second mentioned involved the propriety of the taxation by the District of newsprint paper in its original package. The constitutional question here presented, is one of first impression.

While in the *Neild* case it was held that "when it legislates for the District, Congress acts as a legislature of national character", the opinion does state that Congress in legislating for the District is subject to those prohibitions of the Constitution which act directly or by implication upon the Federal Government,[8] which includes, of course, the due process clause of the Fifth Amendment.

The conclusion of a note, JURISDICTION TO TAX INCOME AS AFFECTED BY CHANGE OF DOMICILE, 35 Harvard Law Review, page 876, after a discussion of the problem, is the following:

> "It appears thus that, regardless of the character of the tax its laws impose, the jurisdiction of the state of the new domicil to tax *income* is limited except in the rare case mentioned[9] either by the actual lack of jurisdiction or the prohibition on its exercise placed by the Fourteenth Amendment, to

[8] 71 App. D. C. page 310.
[9] Not similar to the present case.

> the levy of a tax on or with respect to only so much of the total income as was *acquired after acquisition of the new domicil.*" *(Emphasis supplied.)*

The fact that Section 5 of Title VI of the Income and Franchise Tax Act, Section 47-1567d(a) of the Code, gave a credit against the 1963 District income tax for the income tax paid by the petitioner to his former domicil on the income which he earned from January 1 to March 31, 1963, does not negative or affect the conclusion herein reached. Even if the credit had equaled or exceeded the deficiency, which it did not, the due process clause of the Fifth Amendment did not permit the taxation by the District of income earned in a period during which it had no jurisdiction of either the person or the income of the petitioner.

Conclusion

For the reasons stated the Court holds that a deficiency in income tax for the calendar year, 1963, in the amount of $125.18, was erroneously assessed against, and collected from the petitioner; and that the petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from March 15, 1965, to the date of the payment of the refund.

Decision will be entered for petitioner.

s/ Jo. V. Morgan
Jo. V. Morgan
Judge